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SUPREME COURT, U.S.

In the

Supreme Court of the United States

October Term 1970

No. 1538

JAMES PASSEL, ET AL.,

Appellants,

vs.

FORT WORTH INDEPENDENT SCHOOL DISTRICT, ET AL.,

Appellees.

On Appeal From the Court of Civil Appeals For the Second Supreme Judicial District of Texas at Fort Worth

JURISDICTIONAL STATEMENT

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JANIE PASSEL, ET AL,

Appellants,

vs.

FORT WORTH INDEPENDENT SCHOOL DISTRICT, ET AL,

Appellees.

ON APPEAL FROM THE COURT OF CIVIL APPEALS FOR THE SECOND SUPREME JUDICIAL DISTRICT OF TEXAS AT FORT WORTH

JURISDICTIONAL STATEMENT

This is an appeal by minors of school age, and their parents, individually and as members of a class, from the decision of the Court of Civil Appeals, Second Supreme Judicial District of Texas, entered April 17, 1970, on which Application for Writ of Error was "refused no reversible error" by the Supreme Court of Texas December 2, 1970, with Motion for Rehearing "overruled" by that Court January 6, 1971. Appellants contend that Sec. 4.20 and 4.21 Texas Education Code (formerly Art. 301d Texas Penal Code), a copy of which is attached as Appendix A, violates the First and Fourteenth Amendments of the Constitution of the United States. The Supreme Court of the United States has jurisdiction of this Appeal and a substantial question is presented.

OPINIONS BELOW

The judgment of the Court of Civil Appeals appealed from is reported in 453 S. W. 2d 888, and attached as Appendix B. The opinion of the Supreme Court of Texas, on prior appeal is attached as Appendix C.

JURISDICTION

Appellants filed suit June 6, 1967, in the District Court of Tarrant County, Texas, seeking a Declaratory Judgment and a Temporary Injunction to restrain the Fort Worth Independent School District from enforcing the provisions of Art. 301d Texas Penal Code against Petitioners and other similarly situated students enrolled in the Public Schools of the District because of their membership in privately financed and privately sponsored charitable clubs, or, for that matter, in any kind of organization having a selective membership.

The District Court dismissed the suit, and the Court of Civil Appeals affirmed that judgment on May 17, 1968. (Reported 429 S. W. 2d 917)

Appellants' Application for Writ of Error was granted on April 16, 1969, and the Supreme Court of Texas reversed and remanded the case for trial on the merits. (Appendix C, 440 S. W. 2d 61) Associate Justice Smith dissented on the grounds that judgment should have been rendered for Appellants since the Statute and its application to Appellants, violated the First and Fourteenth Amendments of the Constitution of the United States. (Appendix C, at page 31)

After trial on the merits, Judgment was entered against Appellants on April 17, 1970. The judgment and decision of the Court of Civil Appeals affirming this Judgment is now appealed to the Supreme Court of the United States because the Texas Supreme Court refused Appellants' Application for Writ of Error. *Panhandle Eastern Pipe Line Co., v. Robert S. Calvert, et al,* 347 U.S. 157, (1954).

Appellants' Notice of Appeal to this Court (Appendix D) was filed in the Court of Civil Appeals on February 19, 1971, within the statutorily prescribed period after Motion for Rehearing was overruled by the Texas Supreme Court.

The question involved is the constitutionality under the First and Fourteenth Amendments to the United States Constitution, of a Texas Penal Statute which, as construed and applied in the decision complained of, prohibits persons enrolled in the Public Schools of Texas from belonging to private organizations with a selective membership and requires that—after school hours and off of school property—such persons belong only to organizations open to any pupil. The Court of Civil Appeals expressly rejected a direct challenge to the Statute's constitutionality as depriving persons enrolled in the Public Schools of Texas of "privacy in group association"—after school hours and off of school property—in contravention of the First and Fourteenth Amendments to the Constitution of the United States. This Court has jurisdiction to review that decision by direct appeal under the provisions of 28 U.S.C. §1257 (2); *In the Matter of Samuel Winship*, 397 U.S. 358 (1970); *Bantam Books, Inc., et al v. Joseph A. Sullivan, et al*, 372 U.S. 58, (1963); *B. T. Shelton, et al v. Everett Tucker, Jr., etc., et al, (No. 14); Max Carr, et al v. R. A. Young, et al (No. 83)*, 364 U.S. 479 (1960); *People of the State of Illinois ex rel Vashti McCollum v. Board of Education of School District No. 71, Champaign County, Illinois, et al*, 333 U.S. 203-256 (1948); *Alma Lovell v. City of Griffin*, 303 U.S. 444-453 (1938).

QUESTION PRESENTED

Whether a Texas Statute, Secs. 4.20 and 4.21 of the Texas Education Code (formerly Art. 301d Texas Penal Code) which denies students enrolled in the public schools of Texas the right of privacy in group association—after school hours and off of school property—violates the First and Fourteenth Amendments.

STATUTES INVOLVED

Secs. 4.20 and 4.21, Texas Education Code, Vernon's Annotated Texas Statutes; Art. 301d of the Texas Penal Code; U.S. Constitution, Amendment I and Amendment XIV.

STATEMENT

A. Material Facts.

Appellants brought this suit for Declaratory Judgment questioning the constitutionality of a Texas statute, Art. 301d of the Penal Code, and here appeal from the final judgment upholding the validity of that statute, by the highest court of the State in which a decision could be had.

Appellees, Trustees of the Fort Worth Independent School District, initiated this controversy by promulgating a "Supplementary Application for Enrollment" form (Appendix E) quoting the Penal Statute, the critical parts of which say:

> ". . . (Sec. 1) Public School . . . Secret Societies are prohibited *in* all Public Schools . . . supported in whole or in part from public funds . . . (Sec. 2) . . . A Public School . . . Secret Society . . . is . . . any organization composed . . . in part of public school *pupils* . . . which seeks to perpetuate itself by taking in additional members from the pupils . . . in such school on the basis of the decision of its membership rather than upon the free choice of any *pupil in* the school who is *qualified by the rules of the school* to fill the special aims of the organization . . . (Sec. 4) . . . expel . . . a member . . . (Sec. 6) . . . shall be fined not more than TWO HUNDRED DOLLARS ($200) for each offense." (Emphasis supplied)

Without notice, hearing, or finding the School District added

> "all Secret Societies, including charity clubs, are included and prohibited,"

and Parents are required to certify not only that their sons or daughters are not members of any such organization "in order

to attend school in the Fort Worth Independent School District", but also they must certify that they will not in the future join them or participate in their activities.

The minor Appellants, as members of privately sponsored and financed "Charity Clubs" which conducted their affairs after school hours and off of school property, contended that the Statute applied only to organizations "in" the public schools by reason of school sponsorship or support. The Trial Court found

> "as a fact that the 'Charity Clubs' were not affiliated with, sponsored or supported by the administration of any school within the Fort Worth Independent School District."

Nevertheless, the Court of Civil Appeals held that the Statute applied to any organization with a selective membership, including the Charity Clubs and, "is constitutional."

B. State at Which Federal Question was Raised.

As shown by the annexed opinions, the Federal question in this case was raised by Appellants' Original Petition in the District Court, and asserted at every stage of the proceedings thereafter. It has always been Appellants' position that the Statute was incorrectly construed as applying to Appellants' membership in privately sponsored and financed charity clubs or other private organizations having a selective membership, and that the Statute to be constitutional should be correctly construed as applying only to organizations affiliated with, sponsored or supported by a public school, but that if the Statute was construed as denying Appellants, and other persons enrolled in the public schools of Texas, the right of privacy in group association, then the Statute was in violation of the First and Fourteenth Amendments to the Constitution of the United States.

As shown in the opinion here appealed from as well as the other Appellate opinions, Appellants' contentions were rejected, except in the dissent of Justice Smith, and it is now the law in Texas that students enrolled in its public schools are subject to expulsion and fines for belonging to any organiza-

tion which is not approved by the school and open to all students.

C. No Dispute as to any Relevant Fact

Although the Trial Court found "The activities of the Charity Clubs have substantially and materially disrupted and affected the orderly operations of . . . (the schools) . . .," it is significant to note that the isolated instances of alleged disruptive activities mentioned by witnesses in the employ of the School Board were accompanied by a refusal or inability to identify the individuals said to be involved, or to state whether such acts were club activities as distinguished from individual acts but, as the Court of Civil Appeals opinion shows, this contrived issue of "disruption" was eliminated when that Court chose to base its decision exclusively on the ground that the Statute was constitutional. Of course, the Court of Civil Appeals was correct in ignoring the "disruption" issue as the following cases show:

An individual is entitled to be judged by his own conduct and not that of his associates. *Speiser v. Randall*, 357 U.S. 513, (1958); *Elfbrandt v. Russell*, 384 U.S. 11, (1966).

Proof of misconduct by some members of some organizations is an insufficient basis for the prohibition of the existence of all like organizations. *Amalgamated Food Employees Union, Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, (1968).

Order and decorum in the school system may be maintained by means less stifling of the personal freedom of association of students than the enforcement of the statute in question. ". . . even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton v. Tucker*, 364 U.S. 479, (1960).

To the extent that the statute in question denies the right of freedom of association to all members of the organizations therein prohibited irregardless of their innocence of any mis-

conduct or activities relating to the schools, it is too broadly drawn to constitute a constitutional exercise of the police power. *Cantwell v. Connecticut*, 310 U.S. 296, 311, (1940). *Gilmore v. James*, 274 F. Supp. 75 affd., 19 L.Ed. 2d 783.

THE QUESTION IS SUBSTANTIAL

Since the enactment in 1937 of the Penal Statute in question a great body of law has evolved respecting the constitutional rights of individuals, adult and juvenile. With certain exceptions, compulsory school attendance is required of persons under the age of 18 years residing in Texas and admission into the public schools of Texas must be granted persons not over the age of 21 years. (Texas Education Code §21.031-32). Accordingly, many students enrolled in the public schools of Texas are now entitled to vote, at least at the Federal level. *Oregon v. Mitchell*, — *US* — 27 L Ed 2d 272, 91 S. Ct. (1970). Yet in this year of 1971, by judicial construction, it finally became the law in Texas that students enrolled in its public schools must forego the right of privacy in group association. This Court said in *Gibson v. Florida Investigation Committee*, 372 U.S. 539.

> "This Court has repeatedly held that rights of association are within the ambit of the constitutional protections afforded by the First and Fourteenth Amendments . . .
>
> * * * *
>
> The First and Fourteenth Amendment rights of free speech and free association are fundamental and highly prized, and 'need breathing space to survive.' NAACP v. Button, 371 U S 415, 433, 9 L ed 2d 405, 418, 83 S Ct 328. 'Freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference.' Bates v. Little Rock, supra (361 U S, at 523). And, as declared in NAACP v. Alabama, supra (357 U S, at 462), "It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute [an] . . .

> effective . . . restraint on freedom of association. . . . This Court has recognized the vital relationship between freedom to associate and privacy in one's associations . . . Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.' So it is here."

So it is here. The clubs in question were, in fact, private social and charitable clubs with a selective membership. Whether these particular clubs are revived is of no great moment. The rights so circumscribed are. A statute appropriate to the "in" school group activities of public school students now controls their *out* of school lives. Not only do public school students in Texas have less rights than public school dropouts, the potential for evil is awesome. The Courts of Texas have clothed with the sanctity of constitutionality and placed in the hands of numerous Texas School Boards (some excellent—some less than that) a tool which can become an instrument of repression particularly against the poor and racial minorities, as well as beliefs. The power exists. Associations among minority groups, by definition selective, even fall within the ambit and are subject to the sanctions of this statute. Churches selective in their membership are not exempt from its provisions.

In its prior opinion (429 SW 2d 917) the Court of Civil Appeals said:

> "We doubt that the statute permits of any construction except that it precludes public high school students from membership in any fraternity, sorority or organization such as the charitable clubs involved regardless of whether their activities are conducted on or off the campus."

In the opinion appealed from that Court resolved its doubt holding squarely that the Statute was constitutional and did preclude persons enrolled in the public schools from belonging to private organizations with selective memberships. This eliminated the issue of alleged disruption from the case on appeal, but it also enhanced the danger that the Statute may be employed as an instrument of repression.

Appellants' contention that the statute is unconstitutional is based not only upon deprivation of freedom of association, but also the discrimination in favor of those clubs or organizations specifically exempted, i.e. "Boy Scouts, Hi-Y, Girl Reserves, De Molay, Rainbow Girls, Pan-American Clubs, and Scholarship Societies, and other kindred educational organizations sponsored by the State or National educational authorities." The exemption of certain specified clubs which otherwise fall within the prohibition of the statute is a denial of equal protection of the laws. Appellants are permitted to choose their own associates *only if they do so within organizations which the Legislature has selected for them*. "Big Brother" has gone much too far!

After citing the numerous cases in which the "right of freedom of association" had in recent years been upheld, this Court said in *Gibson v. Florida Investigation Committee*, supra:

> ". . . we hold simply that groups which themselves are neither engaged in subversive or other illegal or improper activities nor demonstrated to have any substantial connections with such activities are to be protected in their rights of free and private association."

No one accused the "charity clubs" of any subversive or illegal activity except the selection of members contrary to the statute.

The requirement that the "Supplementary Application for Enrollment" form (Appendix D) be executed by a parent as a condition precedent to admission of children to school was also upheld by the Court of Civil Appeals in this case. It is shocking to the accepted ideas of due process that a certificate could be required of parents that their children do not and *will not in the future* violate a law as a condition precedent to their use of public school facilities. But even more shocking, is Appellees' policy that the children of those parents who refuse to submit to such tyranny will be deemed guilty, summarily and without hearing, of a violation of law and refused admission to the school.

> ". . . the State cannot condition the granting of even a privilege upon the renunciation of the constitutional right

to procedural due process." *Dixon v. Alabama State Bd. of Educ.*, 294 F. 2d 150 (C. A. 5, 1961), cert. denied, 368 U.S. 930.

Unless granted relief by this Court, school age citizens of the State of Texas face two intolerable alternatives, an infringement upon and deprivation of the free right of association or, an interruption of their education.

Protection has been afforded by this Court to organizations such as the Communist Party and militant groups which preach overthrow of the government or, at least, violence and disobedience of civil authority. Appellants, who seek only to associate with friends of their own selection—have, so far, found no such protection of their civil rights. This Honorable Court has the opportunity and the duty to confirm the fact that civil rights belong to *all* the people—not only to groups which command the support of vocal and militant political groups.

The decision of the Texas Court of Civil Appeals and the Texas statute in question should not be permitted to stand in the light of well settled principles firmly established by the enlightened civil rights decisions of this Court. Probable jurisdiction in this case should be noted to avoid a precedent which would cast the strongest doubt upon the existence of a private right of free association, and make a mockery of our professed efforts to redress the legitimate complaints of our youth and extend to them the responsibilities and rights basic in our Society.

This is not a case where the relief sought will interfere with the "business of running the schools." The Courts should, of course, avoid this. But regulating the conduct and deportment of students *in* school is a very different thing from the regulation of their lives *out* of school, and that is what this case is about. Out of school, persons enrolled in the public schools should be subject only to parental control and the general laws applying to all youth.

In short, the denial of "privacy in group association"—after school hours and off of school property—to persons who

are enrolled in the public schools of Texas is not only unconstitutional, it is against human nature.

Respectfully submitted,

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Attorney for Appellants

CERTIFICATE

I certify that I have served a copy of Appellants' Jurisdictional Statement on Cecil Morgan, Esq., Morgan, Gamble & Owen, Continental Life Building, Fort Worth, Texas 76102, counsel for Appellees, by depositing a copy of same in a mail box with first class Postage prepaid this 7th day of April, 1971.

Rufus S. Garrett, Jr.

APPENDIX A

TEXT OF STATUTES

TEXAS EDUCATION CODE
PENAL PROVISIONS

§4.20. FRATERNITIES, SORORITIES, SECRET SOCIETIES

(a) In all counties of this state, public school fraternities, sororities, and secret societies are prohibited in all the public schools of this state supported in whole or in part from public funds, which schools are below the rank or grade of colleges, and including within said provisions all high schools and junior high schools and all public schools of lower grades.

(b) A public school fraternity, sorority, or secret society as used in this section is hereby defined to be any organization composed wholly or in part of pupils of public schools below the rank of college or junior college as herein provided, which seeks to perpetuate itself by taking in additional members from the pupils enrolled in such school on the basis of the decision of its membership rather than upon the free choice of any pupil in the school who is qualified by the rules of the school to fill the special aims of the organization.

(c) Any public school fraternity, sorority, or secret society as defined in this section is hereby declared to be an organization inimical to the public good.

(d) It shall be the duty of school directors, boards of education, school instructors, and other corporate authority managing and controlling any of the public schools of this state within the provisions of this section to suspend or expel from the school under their control any pupil of such school who shall be or remain a member of, or who shall join or promise to join, or who shall become pledged to become a member of, or who shall solicit any other person to join, promise to join, or be pledged to become a member of any such public school fraternity, or sorority, or secret society. The above restrictions shall not be construed to apply to agencies for public welfare,

viz.: Boy Scouts, Hi-Y, Girl Reserves, DeMolay, Rainbow Girls, Pan-American Clubs, scholarship societies, and other kindred educational organizations sponsored by the state or national education authorities.

(e) Any person violating any provision of this section shall be deemed guilty of a misdemeanor and upon conviction shall be fined not less than $25 nor more than $200 for each offense.

(f) The provisions of this section shall not apply to any universities, colleges, or schools organized for higher education beyond the high school and junior high school level, but the same shall apply to high schools, junior high schools, and all schools of lower grades.

§4.21. Soliciting Pupils to Join Secret Societies

(a) It shall be unlawful for any person not enrolled in a public school to solicit any student enrolled in any public school to join or pledge any public school fraternity, sorority, or secret society, or to solicit any such student to attend a meeting thereof, or any meeting where membership therein is encouraged.

(b) A public school fraternity, sorority, or secret society is any organization composed wholly or partially of students of public schools below the rank of college or junior college which seeks to perpetuate itself by taking in additional members from the student body of the school on the basis of its members' decision rather than on the free choice of any student qualified by the rules of the school to fulfill the special aims of the organization. This definition, however, does not apply to agencies organized for the public welfare including the Boy Scouts, Hi-Y, Girl Reserves, DeMolay, Rainbow Girls, Pan-American Clubs, scholarship societies, or any other kindred education organizations sponsored by state or national education authorities.

(c) Universities, colleges, or other schools organized for education beyond the high school level are exempted from all provisions of this section.

(d) Any person convicted of violating any provision of this section shall be deemed guilty of a misdemeanor and upon conviction for each offense shall be fined not less than $25 nor more than $200.

TEXAS PENAL CODE

ART 301d. FRATERNITIES, SORORITIES AND SECRET SOCIETIES IN PUBLIC SCHOOLS

Prohibition; schools to which applicable

Section 1. In all counties of this State Public School Fraternities, Sororities, and Secret Societies are hereby prohibited in all the Public Schools of this State supported in whole or in part from public funds, which schools are below the rank or grade of Colleges, and including within said provisions all High Schools and Junior High Schools and all Public Schools of lower grades. The provisions of this Act shall not apply to any University, College or State Teachers College.

Definition

Sec. 2. A Public School Fraternity, Sorority, or Secret Society as used in this Act is hereby defined to be any organization composed wholly or in part of public school pupils of public schools below the rank of College or Junior College as herein provided, which seeks to perpetuate itself by taking in additional members from the pupils enrolled in such school on the basis of the decision of its membership rather than upon the free choice of any pupil in the school who is qualified by the rules of the school to fill the special aims of the organization.

Organizations declared inimical to public good

Sec. 3. Any Public School Fraternity, Sorority, or Secret Society as defined in the preceding Section of this Act is hereby declared to be an organization inimical to the public good.

Suspension or expulsion of students; exceptions

Sec. 4. It should be the duty of School Directors, Boards of Education, School Instructors and other corporate authority

managing and controlling any of the Public Schools of this State within the provisions of this Act, to suspend or expel from the school under their control any pupil of such school who shall be or remain a member of, or who shall join or promise to join, or who shall become pledged to become a member of, or who shall solicit any other person to join, promise to join, or be pledged to become a member of any such Public School Fraternity, or Sorority, or Secret Society. Providing that the above restrictions shall not be construed to apply to agencies for Public Welfare, viz: Boy Scouts, Hi-Y, Girl Reserves, De-Molay, Rainbow Girls, Pan-American Clubs, and Scholarship Societies, and other kindred educational organizations sponsored by the State or National education authorities.

Soliciting by person not enrolled in public school

Sec. 5. It shall be unlawful from and after the passage of this Act for any person not enrolled in any such Public School to solicit any pupil enrolled in any such Public School to join or to pledge himself or herself to become a member of any such Public School Fraternity or Sorority, or Secret Society, or to solicit any such pupil to attend a meeting thereof, or any meeting where the joining of any such School Fraternity, Sorority, or Secret Society shall be encouraged.

Violations of act

Sec. 6. Any person violating any provision of this Act shall be deemed guilty of a misdemeanor and shall be fined not less than Twenty-five Dollars ($25), nor more than Two Hundred ($200) for each offense.

Schools to which applicable

Sec. 7. The provisions of this Act shall not apply to schools organized for higher education beyond the High School and Junior High School level, but the same shall apply to High Schools, Junior High Schools, and all schools to[1] lower grades. Acts 1937, 45th Leg., p. 1139, ch. 460; Acts 1949, 51st Leg., p. 803, ch. 429.

[1]So in enrolled bill. Probably should read "of."

APPENDIX B

OPINION APPEALED FROM
453 SOUTH WESTERN REPORTER, 2d SERIES 888

Janie PASSEL et al.,

Appellants,

v.

FORT WORTH INDEPENDENT SCHOOL DISTRICT et al.,

Appellees.

No. 17100.

Court of Civil Appeals of Texas,
Fort Worth.

April 17, 1970.

Rehearing Denied May 15, 1970.

OPINION

LANGDON, Justice.

This is a class suit on behalf of minors, all of whom are members of a charity club, and their parents seeking a judgment declaring that Article 301d of the Vernon's Ann.Texas Penal Code and the rules promulgated by the appellee based upon such Article are unconstitutional and for injunctive relief.

Our original opinion in this case sets forth in some detail the controlling issues which are here involved. Passel v. Fort Worth Independent School District, Tex. Civ. App., 429 S.W.2d 917 (1968). In reversing this court and the trial court and remanding the case the Texas Supreme Court said, "The case has not been tried on its merits, and is not ripe for the rendition of a final judgment. A temporary injunction is not warranted

by the evidence in this record." Passel v. Fort Worth Independent School District, 440 S.W.2d 61 (1969).

Since the two opinions above referred to contain specific quotes from and references to the rules which were promulgated by the appellee and the statute upon which such rules are based there is no need to repeat them here.

The case was tried to the court without a jury. The many witnesses called upon to testify in person or by deposition included school personnel familiar with every facet of school life and many who were not associated with the school but who were familiar with the charity clubs and the organizations excepted by the statute.

The court made and filed findings of fact and conclusions of law most of which are set forth verbatim in its judgment.

In his preface to the findings of fact the court wrote as follows:

"I have concluded that plaintiffs and intervenors have failed to prove that Article 301d of the Penal Code is unconstitutional or that the administrative enforcement of the regulation adopted by the school board for the purpose of implementing this statute violates any of the constitutional rights.

"In Passel et al vs. Fort Worth Independent School District, et al, 440 SW2 61 (Supreme Court), the court held that on the record then before it the statute was not unconstitutional as applied to plaintiffs and indicated that the trial court should hear evidence to determine the aims and activities of the organizations excepted in Section 4 of Article 301d.

"The evidence was substantially the same at the hearing last week as it was at the injunction hearing in 1967 (There was just more of it), except that some evidence was offered about the aims and activities of some of the organizations named in Section 4. (There was no evidence about Boy Scouts, Hi-Y, Girl Reserves or Pan-American Clubs). Evidence was also offered in an attempt to show that at least some of the 'charity clubs' proposed to select members by a board of sponsors composed in part of mothers of active members.

"Plaintiffs and intervenors failed to prove that there was not a reasonable basis for the classification established by the legislature or that the exempting of certain organizations from the statute was palpably arbitrary. There was no evidence whatever that any of the exempted organizations had any effect whatever on the operation of the school system. The amending of the constitutions and by-laws of some of the clubs fails to meet the requirements of Section 2 of the statute that any student who is qualified by the rules of the school to fill the special aims of the organization may join if he chooses to do so.

"I make the following findings of fact and conclusions of law which I suggest be included in the judgment in this case:

"1. This is a class suit on behalf of all minors who are members of a charity club and their parents.

"2. The original twenty-three plaintiffs in this case have all graduated from high school.

"3. The members of the class for whom the original suit was brought have graduated from high school.

"4. Intervenors are all still attending high school and became parties to this suit prior to the time the original plaintiffs graduated from high school.

"5. On November 9, 1966, the Board of Education of the Fort Worth Independent School District promulgated a rule prohibiting fraternities, sororities, secret societies (including charity clubs) from carrying on their activities in grades 7 through 12 in the Fort Worth Public Schools.

"6. To implement the rule enacted by the Board, a supplementary application was required by the parent or guardian of each student enrolled in grades 7 through 12. This form required that the parent or guardian certify that his son or daughter was not a member or pledge of any organization described in Article 301d, and that the child would not join or participate in the activities of such a club or organization.

"7. The original plaintiffs were members of a club prohibited by Article 301d. The intervenors are members of a club prohibited by Article 301d. The amended constitutions and by-

laws of several of the clubs, including the Musagetes, provide that active members of such clubs shall be selected by a board of sponsors consisting, in part, of mothers of active members. Such amended constitutions and by-laws also provide that they may be amended by a vote of the active members. Such constitutions and by-laws do not provide that a pupil in any school who is qualified by rules of the school to fill the special aims of the organization may become a member of such organization upon his free choice. The Musagetes have not selected any members under the new constitution and by-laws and neither it nor any other 'charity club' has operated under amended constitution and by-laws. None of the 'charity clubs', including the Musagetes, has ever selected its members on the basis of the free choice of any pupil in a school who was qualified by school rules to fill the special aims of the organization.

"8. None of the plaintiffs or intervenors has been denied enrollment in the Fort Worth Public Schools.

"9. Every student in the Fort Worth Public School system, including members and non-members of 'charity clubs', is afforded the same educational opportunities without discrimination.

"10. The activities of the 'charity clubs' have substantially and materially disrupted and affected the orderly operation of Arlington Heights High School, Eastern Hills High School and Paschal High School, all of which are high schools within the Fort Worth Independent School District.

"11. Prior to the time that the 'charity clubs' ceased to be active they engaged in activities similar in character to university fraternities, sororities and secret societies in the following manner: Interclub council, rush, pledge, parties, meetings, pins, similar dress.

"12. None of the orgaiizations (Boy Scouts, Hi-Y, et cetera) exempted by the statute has in the past affected the orderly operation of the schools in the Fort Worth Independent School District, and none of such organizations has participated in school activities.

"13. Arlington Heights High School and Paschal High School each has societies and clubs sponsored by school authorities. Any student in each of the schools is eligible for membership in any one or all of such societies and clubs if he meets the special aims of the organization such as scholarship, member of a football team and the like."

An additional finding by the court was: "* * * the Court finds as a fact that the 'Charity Clubs' were not affiliated with, sponsored or supported by the administration of any school within the Fort Worth Independent School District."

The court made the following conclusions of law:

"1. The legislature alone determines the public policy for the state, and this court presumes that the legislature considered all of the facts which are in evidence when it enacted Article 301d of the Penal Code.

"2. Courts favor constitutionality of statutes and must presume that the legislative body has acted within its powers in enacting Article 301d.

"3. One who attacks the constitutionality of a statute must show that the statute is palpably arbitrary, and without reasonable basis.

"4. Plaintiffs and intervenors have failed to show by a preponderance of the evidence that the legislature had no reasonable basis for the classification established in Section 4, Article 301d, Penal Code, or that the enactment of the statue was palpably arbitrary.

"5. The classification set forth in Section 4 does not constitute an unlawful discrimination against plaintiffs and intervenors, nor does the act or any section thereof deprive plaintiffs and intervenors of any personal or civil right guaranteed to them by the state or federal constitutions."

The appellants by twenty-six (26) points contend that the court erred in making certain of the findings made by it and in refusing to make other findings. There are also "no evidence" and "contrary to the evidence" points.

We affirm.

We have once again examined the entire record in this

case. We find and hold that there is ample evidence in the record to support each and all of the findings of the court and its judgment based thereon. No useful purpose can be served by a lengthy discussion of the evidence. It should suffice to say that as in most adversary proceedings there was evidence on both sides.

[1, 2] The trial judge was the sole judge of the credibility of the witnesses and the weight to be given their testimony. This court is bound by its findings and conclusions which find support in the evidence.

[3] This court in its original opinion wrote in some detail concerning the constitutional aspects of this case. Reference is made to that opinion for the citation of and a discussion of the authorities pertaining thereto. Based upon those same authorities we find and hold that Article 301d is not unconstitutional as contended by the appellants.

In support of our holding we cite the following additional authorities, Antell vs. Stokes, 287 Mass. 103, 191 N.E. 407 (1934), and Satan Fraternity v. Board of Public Institution, 156 Fla. 222, 22 So.2d 892 (Sup.Ct. of Florida, 1945).

[4] The Texas Supreme Court has held that the rule adopted by the appellees based upon the statute in question and to insure compliance with its provisions "should stand or fall with the statute." Passel v. Fort Worth Independent School District, 440 S.W.2d 61, supra. In holding as we do that the statute is constitutional, the rule promulgated by the appellee "should stand."

[5] "The predominant interest of a school is to educate its students. If a particular type of conduct has the effect of disrupting the learning atmosphere, it should be subject to regulation." Davis v. Firment, 269 F.Supp. 524 (U.S.Dist.Ct., E. D.La., New Orleans Div., 1967)

Many of the same questions posed by this appeal were raised and answered in the case of Satan Fraternity v. Board of Public Instruction, supra. The following language from that case is set forth as follows:

"It is quite true as contended by appellants that purely social activities should not be tinkered with by law but whether high school fraternities and sororities are purely social is a question of fact which the legislature has answered in the negative and we find no reason to disturb their finding. We cannot see that the question of state vs. parental control enters into the picture in any manner. The public school system has a very definite place in our scheme of things and the question in every case is whether or not the high school fraternity or sorority disrupts or materially interferes with that purpose. The cases here cited show conclusively that there has long been a feeling in this country that this question requires an affirmative answer, and the legislature has concluded the matter in this State.

"We find nothing in the act assaulted that trenches on due process, the right of assembly, equal protection of the law, or any other liberty guaranteed to appellants. It is at least far fetched to contend that high school fraternities and sororities are on a parity with religious organizations and fraternal societies such as the Masons, Elks, Odd Fellows, and others. The Church and the Masons are much older than the State and fostered education long before the State did and have never been charged with acts inimical to it.

"In conclusion, it is pertinent to state that none of our liberties are absolutes; all of them may be limited when the common good or decency requires. Even freedom of religion, the most cherished of all our freedoms, has been limited. Davis v. Beason, 133 U.S. 333, 10 S.Ct. 299, 33 L.Ed. 637. Freedom after all is not something turned footloose to run as it will like a thoroughbred in a blue grass meadow. Freedom in a democracy is a matter of character and tolerance. The ideal recipient of it is one who voluntarily refuses to sacrifice the common good to personal passion.

"Tested by these criteria, we cannot say that the act and regulations in question are vulnerable to the assault made on them."

In our original opinion (429 S.W.2d 917) we cited and quoted from the case of University of Mississippi v. Waugh,

105 Miss. 623, 633, 62 So. 827, 830 L.R.A.1915D, 588, Ann.Cas.1916E, 522. Reference is made to the citation and the quotation appearing in that opinion. We previously cited the case of Robinson v. Sacramento City Unified School District, 245 Cal.App.2d 278, 53 Cal.Rptr. 781 (1966) for an informative review of secret societies such as are involved in this case.

[6-9] "Among the things a student is supposed to learn at school (at least, such is my idea) is a sense of discipline. Of course, rules cannot be made by authorities for the sake of making them but they should possess considerable leeway in promulgating regulations for the proper conduct of students. Courts should uphold them where there is any rational basis for the questioned rule. All that is necessary is a reasonable connection of the rule with the proper operation of the schools. By accepting an education at public expense pupils at the elementary or high school level subject themselves to considerable discretion on the part of school authorities as to the manner in which they deport themselves. Those who run public schools should be the judges in such matters, not the courts. The quicker judges get out of the business of running schools the better. * * * Except in extreme cases the judgment of school officials should be final in applying a regulation to an individual case." Stevenson v. Wheeler County Board of Education, 306 F. Supp. 97 (U.S. Dist. Ct., S.D.Ga., Dublin Div., Nov. 17, 1969).

We have considered all of the appellants' points of error, singly and collectively, and each is specifically overruled. On the basis of the facts contained in this record and the authorities as applied to such facts the judgment of the trial court is in all things affirmed.

Affirmed.

APPENDIX C

OPINION OF THE SUPREME COURT OF TEXAS
(ON PRIOR APPEAL)

440 S.W. 2d 61

JANIE PASSELL, ET AL.

Petitioners,

vs.

FORT WORTH INDEPENDENT SCHOOL DISTRICT ET AL.,

Respondents.

No. B-1018

Supreme Court of Texas.

April 16, 1969.

Rehearing Denied May 14, 1969.

WALKER, Justice.

This suit was brought by a number of high school students and their parents against the Fort Worth Independent School District and the members of its Board of Education. Plaintiffs seek a judgment declaring that Article 301d, Vernon's Ann.P. C., is unconstitutional and enjoining defendants from denying the minor plaintiffs admission to the schools because of membership in one of the so-called charity clubs. Defendants interposed pleas to the jurisdiction, asserting: (1) that plaintiffs had not exhausted their administrative remedies, and (2) that the action is an improper attempt to have a court of equity pass on the validity of a criminal statute without any showing of irreparable injury to vested property rights. After a hearing on the application for a temporary injunction, the trial court sus-

tained the pleas to the jurisdiction and dismissed the cause. The Court of Civil Appeals affirmed. 429 S.W.2d 917. We reverse the judgments of the courts below and remand the cause to the district court.

By the provisions of Article 301d, public school fraternities, sororities and secret societies as there defined are declared to be inimical to the public good and are prohibited in all public schools of the state below college level. Insofar as material here, the statute further provides:

> "Sec. 2. A Public School Fraternity, Sorority, or Secret Society as used in this Act is hereby defined to be any organization composed wholly or in part of public school pupils of public schools below the rank of College or Junior College as herein provided, which seeks to perpetuate itself by taking in additional members from the pupils enrolled in such school on the basis of the decision of its membership rather than upon the free choice of any pupil in the school who is qualified by the rules of the school to fill the special aims of the organization.
>
> * * *
>
> "Sec. 4. It should be the duty of School Directors, Boards of Education, School Instructors and other corporate authority managing and controlling any of the Public Schools of this State within the provisions of this Act, to suspend or expel from the school under their control any pupil of such school who shall be or remain a member of, or who shall join or promise to join, or who shall become pledged to become a member of, or who shall solicit any other person to join, promise to join, or be pledged to become a member of any such Public School Fraternity, or Sorority, or Secret Society. Providing that the above restrictions shall not be construed to apply to agencies for Public Welfare, viz: Boy Scouts, Hi-Y, Girl Reserves, DeMolay, Rainbow Girls, Pan-American Clubs, and Scholarship Societies, and other kindred educational organizations sponsored by the State or National education authorities."

As originally enacted in 1937, the statute applied only in counties have a population of not less than 320,000 and not more than 350,000 inhabitants. It was amended in 1949 and made applicable in all counties of the state. On November 9, 1966, the Board of Education of Fort Worth Independent School District adopted a supplementary enrollment application form and a rule effective September 1, 1967, requiring all pupils to submit the completed form as part of their application for enrollment. The form is as follows:

> "As required by the Board of Education in compliance with Article 301d, of the Texas Penal Code, which reads as follows:
>
> [Article 301d quoted in full]
>
> "I hereby certify that my son/daughter_____ is not now a member or a 'pledge' of any club or organization as defined above and that he/she will not join or participate in any way in the activities of such a club or organization.
>
> "Witness my hand this____day of_____19____.
>
> _____
>
> Signature of Parent or Guardian

Each of the minor plaintiffs is, or was at the time suit was instituted, a member of one of the charity clubs. These clubs fall within the terms of the definition found in section 2 of Article 301d. They are perpetuated by taking in additional members from pupils enrolled in the schools on the basis of the decision of the membership. A student is not allowed to join by his own free choice even though he may be qualified by the rules of the school to fill the special aims of the organization. The clubs hold regular meetings, sponsor social functions, and make financial contributions to worthwhile charities. Their meetings and social functions are held off school premises and during hours when school is not in session. The extent to which

the clubs and their activities may affect the operation of the schools is not fully disclosed by the present record. It appears that on at least one occasion part of the initiation procedure was conducted on school premises. The athletic programs have been so disrupted that the coaches at two high schools prohibited participation by any student who belonged to one of the clubs. There is no evidence tending to show that the clubs do not have an adverse effect on the schools except the proof concerning the places and hours of their meetings and social functions.

Plaintiffs contend that Article 301d does not apply to the charity clubs. They say that if it does, the statute is unconstitutional either on its face or in its application. They first filed suit in the United States District Court seeking substantially the same relief that is sought here. That proceeding was stayed by the court "until the courts of the State of Texas shall have been afforded the opportunity to determine the constitutional quesions here presented, and until the administrative remedies available to the plaintiffs have been utilized." The present suit was then filed.

[1-4] It has been said that the power and authority to interpret criminal statutes rests solely with the courts of this state exercising criminal jurisdiction. Crouch v. Craik, Tex. Sup., 369 S.W.2d 311. We have already confessed that this statement is much too broad. State v. Shoppers World, Inc., Tex.Sup., 380 S.W.2d 107. It is well settled that courts of equity will not interfere with the ordinary enforcement of a criminal statute unless the statute is unconstitutional and its enforcement will result in irreparable injury to vested property rights. City of Fort Worth vs. Craik, Tex.Sup., 411 S.W.2d 541. The underlying reason for this rule is that the meaning and validity of a penal statute or ordinance should ordinarily be determined by courts exercising criminal jurisdiction. When these questions can be resolved in any criminal proceeding that may be instituted and vested property rights are not in jeopardy, there is no occasion for the intervention of equity. A person may continue his activities until he is arrested and then procure

his release by showing that the law is void. See City of Austin v. Austin City Cemetery Ass'n, 87 Tex. 330, 28 S.W. 528.

[5] It has also been said that courts of equity are concerned only with the protection of civil property rights. Ex parte Sterling, 122 Tex. 108, 53 S.W.2d 294. This is not the modern view, and it seems clear to us that the Texas statute is broad enough to authorize the granting of an injunction for the protection of personal rights. See Article 4642;[1] Ex parte Warfield, 40 Tex. Crim. 413, 50 S.W. 933; Hunt v. Hudgins, Tex.Civ.App., 168 S.W.2d 703 (no writ); Hawks v. Yancey, Tex.Civ.App., 265 S.W. 233 (no writ); Annotation, 175 A.L.R. 438; Pound, Equitable Relief Against Defamation and Injuries to Personality, 29 Harv.L.Rev. 640; Lorg, Equitable Jurisdiction to Protect Personal Rights, 33 Yale L.J. 115.

Plaintiffs are not attempting to enjoin prosecutions under Article 301d. Apparently no prosecution is threatened or even contemplated. Injunctive relief is sought to prevent administrative enforcement of an administrative regulation adopted for the purpose of implementing the statute. The rule of the Board of Education requires a student to furnish, as part of his application for admission, a statement that he is not and will not become a member of one of the organizations prohibited by Article 301d. Although defendants argue that no one has been denied the right to attend school, there is nothing in the present record to warrant the belief that a pupil who refused to furnish the statement would be permitted to enroll.

[6] Plaintiffs contend that the statute and rule, if applicable to the charity clubs, constitute an unwarranted interference with the constitutionally protected right of free and private association. If this contention is sound, enforcement of the rule adopted by the Board will mean that a student cannot enjoy the benefits to which he is entitled under the provisions of

1. All statutes except Article 301d are cited by the article number under which they appear in Vernon's Ann.Tex.Civ.Stat.

Article 2902[2] unless he is willing to be circumscribed in the exercise of one of his constitutional rights. The criminal courts cannot determine the meaning and validity of the statute unless a prosecution is instituted, and plaintiffs have no way to attack the rule except by an administrative appeal or a civil action. The civil courts are not powerless to grant relief under these circumstances, and we hold that the trial court erred in dismissing the cause on the ground that it had no jurisdiction to construe and determine the constitutionality of the criminal statute in this proceeding.

[7] The case was also dismissed because plaintiffs had not exhausted their administrative remedies. According to a letter opinion which appears in the transcript, the trial court concluded that there should be an administrative determination, by the State Commissioner of Education or the State Board of Education on appeal from the action of the local Board, as to: (1) whether Article 301d should be enforced, and (2) whether the charity clubs adversely affect the operations of the Fort Worth Independent School District. Plaintiffs do not contend that the rule is unwise or unsound as a matter of policy in the administration of the school laws. They do not say that the rule constitutes an abuse of the discretion vested in the Board of Education by law. Their attack is based entirely on the construction and constitutionality of the statute and rule.

Defendants argue that wholly apart from Article 301d, the rule is a valid exercise of the general power of management and control vested in the trustees by law. It seems clear to us, however, that the rule was adopted for the purpose of insuring compliance with the statute. If it is finally determined that the charity clubs are not covered thereby or that the statute is unconstitutional, it is our opinion that enforcement of the rule

2. Art. 2902.
* * * The board of school trustees of any city or town or independent or common school district shall admit to the benefits of the public schools any person over six and not over twenty-one years old at the beginning of the scholastic year, if such person or his parents or legal guardian reside within said city, town or district.

should be restricted accordingly. In other words the rule, which is based upon the statute, should stand or fall with the statute. The Board will then be free, as always, to adopt any legal rules it may consider appropriate in the exercise of the general powers conferred upon it by law. We agree with the Court of Civil Appeals that the case turns upon questions of law that can be determined by the court after the facts concerning the effect of the clubs upon the operation of the schools have been fully developed. It was not necessary, therefore, for plaintiffs to prosecute an administrative appeal before instituting the present action.

[8] The parties have briefed and argued the merits of the case at length, but we do not attempt to decide these questions here. As previously indicated, this is an appeal from a dismissal of the cause at the conclusion of the hearing on the application for a temporary injunction. According to one of the briefs filed by defendants, all of the minor plaintiffs are either attending school or have graduated. The case has not been tried on its merits, and is not ripe for the rendition of a final judgment. A temporary injunction is not warranted by the evidence in this record. No attempt was made to prove the aims and activities of the organizations excepted in Section 4 of Article 301d, and our judicial knowledge about some of them is rather limited. It cannot be said on the present record that there is no reasonable basis for the classification established by the Legislature or that the statute is unconstitutional as applied to plaintiffs. Wholly apart from any question as to the meaning and constitutionality of Article 301d, moreover, the trial court would, in the exercise of a sound discretion, be justified in denying a temporary injunction unless it appears that the rule as adopted and enforced by the Board constitutes an unwarranted interference with the exercise by plaintiffs of a constitutionally protected right.

The judgments of the courts below are reversed, and the

cause is remanded to the district court for further proceedings not inconsistent with this opinion.

SMITH, J., dissenting.

McGEE, J., not sitting.

SMITH, Justice (dissenting).

I respectfully dissent. In order to decide the issue in this case, it is entirely unnecessary to place further limitations upon the holding in Crouch v. Craik, 369 S.W.2d 311 (Tex.Sup. 1963) and Ex parte Sterling, 122 Tex, 108, 53 S.W.2nd 294 (1963). I agree that, this being a declaratory judgment suit, courts of equity have jurisdiction to pass upon the validity of the statute involved. This is not a case where prosecutions under the provisions of Article 301d, a criminal statute, are involved. It is a case, however, wherein this Court should promptly determine whether or not the application of the statute and rule adopted by the school board constitutes an unwarranted interference with the constitutionally protected right of free and private association by the members of the clubs in accordance with the constitution and by-laws governing such clubs. The paramount question involved can be finally determined by this Court on the basis of the facts introduced at the hearing held in the District Court of Tarrant County, Texas, on June 22, 1967. The school district admitted that the evidence it offered was all of the evidence it could produce, except that which would be "merely cumulative of this same subject * * *, so we offer this only to show it does affect the school program, so we rest."

The facts are these. It was stipulated that all clubs involved were of the same general nature, charity clubs. The constitution of each club was introduced in evidence. The Inter-Club Council, which governs all clubs involved, as each club is a member, states in its constiution its purpose to be: "The purpose of this Council shall be to promote friendship among the Charity Clubs of boys and girls of high school age."

The constitution further provides in section 1 that "the membership of this Council shall be well-established charity clubs of boys and girls of high school age." It is provided in section 2 that "clubs wishing admittance shall submit a written petition to the membership committee and shall fulfill certain other requirements."

In regard to meeting places, the constitution provides, as follows:

'ARTICLE VIII—SPECIAL RESTRICTIONS

Section 1. No meetings or functions of either the Inter-Club Council or any member club shall be conducted during public school hours or on public school property or premises.

Section 2. No member or provisional member of any member club shall be required or permitted to engage in any club activities during public school hours or on public school premises.

Section 3. No member or provisional member of any member club shall be subjected to any requirements which would necessitate neglect of school duties.

Section 4. Partiality to individual clubs shall not enter into school politics.

Section 5. No club in I.C.C. shall have pledge activities on any public school grounds or at any public school sponsored activities. A fine of $100.00 may be charged to any club violating this rule."

The constitutions of the member clubs are also in evidence. Generally, the object of the clubs is stated to be to contribute to local charitable institutions through proceeds from various non-professional entertainments and to promote loyalty, congeniality, lofty ideals and character among high school students, girls and boys. One of the clubs has for its purpose "to promote brotherhood, social activities and charity." These member clubs' constitution provided for regular meetings and special meetings, but nothing is contained in any of the constitutions which even

indicates that the meetings were to be held at any place on the school campuses. In fact, the testimony shows that all meetings were held at places not under the control of the school district and at times not in conflict with school hours. The evidence shows that the parents of the minors involved were required to execute a Supplemental Enrollment Form certifying that their children, otherwise eligible to reenter the public schools in the fall of 1967, were not members of clubs falling within the definition of Article 301d, Texas Penal Code, and that the children would not in the future participate in the activities of such clubs. The refusal of the parents to comply precipitated this declaratory judgment suit. There is no hint in the evidence that the "Charity Clubs" in question are charged with subversive or any other improper activity, except the selection of members contrary to rules promulgated by the school districts based upon Article 301d of the Penal Code. On the other hand, the evidence shows that certain clubs have raised as much as $2,500.00, $3,000.00, $3,800.00, for such organizations as the Mental Health Association, the Child Study Center and the Fort Worth Children's Hospital.

The school district, through their counsel, stated in open court that "I don't think there is any argument that the School Board proposes to enforce it's rule and proposes to keep parties who are members of the type of organizations to which the plaintiffs join from entering school in 1967."

The school district introduced the testimony of two football coaches, who testified in regard to the activities of the clubs in relation to athletic activities. Coach Ludiker testified that about five or six years before June 22, 1967, the athletic department adopted a rule prohibiting members of these clubs from participating in athletics. His reasons for adopting the rule were that he observed some of them "doing ring around the rosy and taking ROTC hats of those who pledge and carrying lunch trays and all of this business, and to me that is not the making of good athletes, and the reports come in of some of our boys attending some of these parties that were drinking."

Ludiker also testified that besides doing ring around the rosy, carrying lunch trays and taking ROTC hats, names of the clubs were plastered on furniture in the school. He said that the school had not promulgated a rule to stop playing "ring around the rosy" on the campus; they are not supposed to pledge in the lunch rooms and that the rule against pledging in the lunch rooms was being followed by the members of the clubs. Then he was asked: what about the problem with ROTC caps? Has that been remedied? He answered: "That has been solved as far as I know." He further testified that unity had prevailed since the rule separating the clubs from athletics, even though the clubs were still in existence.

Ludiker further testified: "Athletics is open to any one that wants to participate, but we felt like if they carried on with some of the activities that they carried on with we would not have the unity of being a good athletic team for Arlington Heights." Ludiker testified that the entire athletic program at Arlington Heights was conducted under the rule that all boys belonging to these Intercouncil Clubs were barred from playing on the athletic teams. He testified on cross-examination that he had had no problems with the clubs since the adoption of the rule.

Mr. James Cox, a coach with the Fort Worth public school system, the respondent here, testified that he was a biology and physical education teacher in the Paschal High School; he had been an assistant coach since 1960 and the head track coach since 1961; he had been recently elevated to head coach and athletic director of the new Southwest High School. He testified that the clubs, to his knowledge, did not exist, so far as Paschal was concerned, "until about three years ago." Cox was of the opinion that "football probably carries the High Schools, and this is what I am more or less interested in, but our athletic program in the past two years has not been as good as it had been prior to that. Now I feel this because since this time, in the three years, since these clubs have really gotten organized and have been established at the school that they have destroyed what we had at Paschal for the first five years I was there team

unity." Cox testified that he had seen students, members of the clubs and athletes, carrying petitions (no actual knowledge of contents) and on one occasion he saw some "paddles" used by boys initiating club members, but that this incident occurred after school 'right down at the end of the parking lot on the school premises." The witness declined to give the names of the boys involved, but stated that they were athletes as well as members of the clubs. All of these incidents brought about the adoption of a rule prohibiting members of the secret clubs from participating in any form of athletics at Paschal High School. "We, just this past spring, the past school semester, the coaches got together and we decided that anybody who was a member of one of the clubs would not participate in athletic programs at Paschal High School." He testified further that the rule would be enforced at the new school at Southwest. Although Cox says that these clubs "have been established at the school", there is not one scintilla of evidence that these clubs are "at the school" in the sense that they are "in" the schools and conduct their meetings and other activities in the schools or on the campuses of the schools.

The Legislature, in adopting Article 301d, intended to regulate only organizations which are "in" the public school system by reason of sponsorship or support. See Gibson v. Florida Investigation Committee, 372 U.S. 539, 83 S.Ct. 889, 9 L.Ed.2d 929 (1963). I cannot agree with the school district's contention that the statute is to be interpreted as prohibiting membership in any organization within the definition of Section 2 of the statute regardless of the fact that these clubs meet entirely off school premises and during hours when school is not in session. The charity clubs here involved are not in the public schools, and if the statute should be intended to apply to these clubs which are outside of the schools, then it is unconstitutional. There is nothing in this record to authorize the school board to suspend the members of these clubs and deprive them of the protection in their right of freedom of association, their vested property rights and the right to an education, afforded them by Article VII of the Texas Constitution and

Article 2902, Vernon's Annotated Civil Statutes. Furthermore, Article 301d, if interpreted as the school district desires, is invalid as an unreasonable restriction of the club members' right to freedom of association guaranteed by the First and Fourteenth Amendments to the United States Constitution. In my opinion, the statute is unconstiutional not only because of deprivation of freedom of association, but also because of discrimination in favor of those clubs or organizations specifically exempted, such as DeMolay, Rainbow Girls, Boy Scouts, Hi-Y, Girl Reserves, and other like educational organizations.

As was said by the Court in Buchanan v. Warley, 245 U.S. 60, 74, 38 S.Ct. 16, 18, 62 L.Ed. 149, 160, " * * * the police power, broad as it is, cannot justify the passage of a law or ordinance which runs counter to the limitations of the federal Constitution", and I will add the Texas Constitution. Granted that the few acts attributed to the minor petitioners in this case may be the subject of distraction and subject to regulation, I cannot conceive of any justification for a requirement that these clubs be disbanded or that the children be suspended from the school of their choice. See Shelton v. Tucker, 364 U.S. 479, 488, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960). There can be no question but that under a prior state of facts, the school board has the power and authority to suspend students for "incorrigible conduct" under Article 2904 or to expel them for violation of Article 301d, *supra*, but there can be no authority for the arbitrary refusal of admission to students whose parents will not sign the certificate quoted in the Court's opinion. See Gilmore v. James, 274 F.Supp. 75 (D.C.Tex.) aff'd 389 U.S. 572, 88 S.Ct. 695, 19 L.Ed.2d 783, reh. den. 390 U.S. 975, 88 S.Ct. 1027, 19 L.Ed.2d 1195 (1968).

Since the record has been fully developed, this Court should reverse the judgments of the lower courts and render judgment declaring unconstitutional Article 301d. If the Court adheres to its present views, then the District Court should be instructed to grant a temporary injunction to preserve the status quo. The status quo is the right of the minor students involved and those of the same class to continue their education pending

final disposition of this case. I think the failure of the trial court to grant a temporary injunction would constitute an abuse of discretion.

APPENDIX D

Filed in Court of Civil Appeals
For 2nd Supreme Judicial
District of Texas
February 19, 1971

LIDA SWANSON
CLERK

NO. 17100

IN THE
COURT OF CIVIL APPEALS
FOR THE SECOND SUPREME JUDICIAL DISTRICT
OF TEXAS
AT FORT WORTH

JANIE PASSELL, ET AL

Appellant,

vs.

FORT WORTH INDEPENDENT SCHOOL DISTRICT,
ET AL,

Appellees,

Appealed From the District Court of Tarrant County, Texas
17th Judicial District

NOTICE OF APPEAL
TO THE SUPREME COURT OF THE UNITED STATES

TO THE HONORABLE COURT OF CIVIL APPEALS

I. Notice is hereby given that Appellants,[1] Janie Passel, et al, individually and as members of a class, appeal to the

1. The names of the individual Appellants are specified in Appendix "A" attached hereto and incorporated in this Notice by reference for all purposes.

Supreme Court of the United States from the final judgment of the Fort Worth Court of Civil Appeals, Second Supreme Judicial District, reported 453 SW 2d 888, on which Application for Writ of Error was "refused no reversible error" by the Supreme Court of Texas on December 2, 1970, with Motion for Rehearing duly "overruled" by said Court on January 6, 1971.

II. This Appeal is taken pursuant to 28 USCA §1257 (2).

III. The final judgment from which this Appeal is taken upheld the validity of Art. 301d of the Texas Penal Code (now Sec. 4.20 et seq of the Texas Education Code) against Appellants' contention that said Statute as construed and applied is in violation of the 1st and 14th Amendments to the Constitution of the United States in denying privacy in group association—after school hours and off of school property—to persons enrolled as students in the public schools of Texas.

RUFUS S. GARRETT, JR.
GARRETT, SETTLE & CALLAWAY
919 Fort Worth National Bank Bldg.
Fort Worth, Texas 76102
Attorneys for Appellants

CERTIFICATE

I certify that I have served a copy of Appellants' Notice of Appeal on Cecil Morgan, Esq., Morgan, Gamble & Owen, Continental Life Building, Fort Worth, Texas 76102, counsel for Appellees, by depositing a copy of same in a mail box with first class Postage prepaid this 19th day of February, 1971.

RUFUS S. GARRETT, JR.

APPENDIX "A"
TO NOTICE OF APPEAL TO
THE SUPREME COURT OF THE UNITED STATES

APPELLANTS

JANIE PASSEL	
By father and next friend	Charles F. Passel
BARBARA AGEE	
By father and next friend	John Frank Agee
MARY ELLEN SETTLE	
By father and next friend	Peveril O. Settle, Jr.
SHARON KEMP	
By father and next friend	Joe S. Kemp
BETSY CORNELIUS	
By father and next friend	W. C. Cornelius
BARBIE WILSON	
By father and next friend	John L. Wilson
CHRIS WOLFE	
By father and next friend	Delmar S. Wolfe
CYNTHIA CROW	
By father and next friend	A. E. Crow
JANICE COX	
By father and next friend	Roy M. Cox
JANET MERRITT	
By father and next friend	Jerry E. Merritt, Jr.
PAT HUNT	
By father and next friend	Roy Hunt
MARSHA MILLER	
By father and next friend	Charles J. Miller
DEBBIE FRANCIS	
By father and next friend	John W. Francis
KAREN HERWIG	
By father and next friend	Jack E. Herwig
ANDREA LEDBETTER	
By father and next friend	Dave Ledbetter
MARJORIE TRIPP	
By father and next friend	Baird Tripp

APPELLANTS (INTERVENORS)

SHERRY McMENNEMY	
By father and next friend	James G. McMennemy
NANCY WALDRUP	
By father and next friend	J. D. Waldrup
BOB MERRILL	
By father and next friend	W. H. Merrill
JEFF EMRICH	
By father and next friend	C. H. Emrich
HARRY L. TENNISON	
Individually and as next friend for his daughter	Kit Tennison
LESLIE LIGON McCLURE	
Individually and as next friend for his daughter	Ann Melissa McClure
ROBERT W. LEONARD	
Individually and as next friend for his daughter	Ellen Leonard
MRS. EMORY CANTEY	
Individually and as next friend for his daughter	Charlotte Marchesseau
DR. JACK S. DeBUSK	
Individually and as next friend for his daughter	Gretchen DeBusk
CAMERON SHROPSHIRE	
Individually and as next friend for his daughter	Sharon Shropshire

APPENDIX E

In order to attend school in the Fort Worth Independent School District, each pupil in Grades 7-12, inclusive, is required to submit a signed copy of the following Supplementary Application for Enrollment blank.

SUPPLEMENTARY APPLICATION FOR ENROLLMENT

Fort Worth Public Schools

As required by the Board of Education in compliance with Article 301d, of the Texas Penal Code, which reads as follows:

"Art. 301d. (P.C.) Fraternities, sororities and secret societies prohibited.—Section 1. In all counties of this State Public School Fraternities, Sororities, and Secret Societies are hereby prohibited in all the Public Schools of this State supported in whole or in part from public funds, which schools are below the rank or grade of Colleges, and including within said provisions all High Schools and Junior High Schools and all Public Schools of lower grades. The provisions of this Act shall not apply to any University, College or State Teachers College.

"Sec. 2. A Public School Fraternity, Sorority, or Secret Society as used in this Act is hereby defined to be any organization composed wholly or in part of public school pupils of public schools below the rank of College or Junior College as herein provided, which seeks to perpetuate itself by taking in additional members from the pupils enrolled in such school on the basis of the decision of its membership rather than upon the free choice of any pupil in the school who is qualified by rules of the school to fill the special aims of the organization.

"Sec. 3. Any Public School Fraternity, Sorority, or Secret Society as defined in the preceding Section of this Act is hereby declared to be an organization inimical to the public good.

"Sec. 4. It should be the duty of School Directors, Boards of Education, School Instructors and other corporate authority managing and controlling any of the Public Schools of this State within the provisions of this Act, to suspend or expel from the school under their control any pupil of such school who shall be or remain a member of, or who shall join or promise to join, or who shall become pledged to become a member of, or who shall solicit any other person to join, promise to join, or be pledged to become a member of any such Public School Fraternity, or Sorority, or Secret Society. Providing that the above restrictions shall not be construed to apply to agencies for Public Welfare, viz: Boy Scouts, Hi-Y, Girl Reserves, DeMolay, Rainbow Girls, Pan-American Clubs, and Scholarship Societies, and other kindred educational organizations sponsored by the State or National educational authorities.

"Sec. 5. It shall be unlawful from and after the passage of this Act for any person not enrolled in any such Public School to solicit any pupil enrolled in any such Public School to join or to pledge himself or herself to become a member of any such Public School Fraternity or Sorority, or Secret Society, or to solicit any such pupil to attend a meeting thereof, or any meeting where the joining of any such School Fraternity, Sorority, or Secret Society shall be encouraged.

"Sec. 6. Any person violating any provision of this Act shall be deemed guilty of a misdemeanor and shall be fined not less than Twenty-five Dollars ($25), nor more than Two Hundred Dollars ($200) for each offense.

"Sec. 7. The provisions of this Act shall not apply to schools organized for higher education beyond the High School and Junior High School level, but the same shall apply to High Schools, Junior High Schools, and all schools to lower grades. Acts 1937, 45th Leg., p. 1139, ch. 460; Acts 1949, 51st Leg., p. 803, ch. 429.)"

All secret societies, including charity clubs, are included and prohibited.

I hereby certify that my son/daughter_____ is not now a member nor a "pledge" of any club or organization as defined above and that he/she will not join nor participate in any way in the activities of such a club or organization.

Witness my hand this____day of_____, 19__.

_____

Signature of Parent or Guardian Only

Form 900

SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
APR 29 1971
E. ROBERT SEAVER, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1970

No. 1538

JANIE PASSEL, ET AL., *Appellants,*

vs.

FORT WORTH INDEPENDENT SCHOOL DISTRICT, ET AL., *Appellees.*

On Appeal From the Court of Civil Appeals
For the Second Supreme Judicial District of Texas
at Fort Worth

Appellees' Motion to Dismiss the Appeal on the Ground That It Does Not Present A Substantial Federal Question and an Alternate Motion to Affirm

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IN THE

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at Fort Worth

Appellees' Motion to Dismiss the Appeal on the Ground That It Does Not Present A Substantial Federal Question and an Alternate Motion to Affirm[1]

CONSTITUTIONAL AND STATUTORY PROVISIONS

Article VII, Section 1, of the Constitution of the State of Texas provides as follows:

> "A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools."

[1]The Appellees in this case are the Fort Worth ISD and the members of the Board of Education.

Article 2780, Vernon's Annotated Texas Civil Statutes, provides as follows:

> "Said trustees shall adopt such rules, regulations and by-laws as they may deem proper; and the public free schools of such independent district shall be under their control; and they shall have the exclusive power to manage and govern said schools, * * *"

Article 301d, Vernon's Annotated Penal Code of the State of Texas, provides as follows:

> "Section 1. In all counties of this State Public School Fraternities, Sororities, and Secret Societies are hereby prohibited in all the Public Schools of this State supported in whole or in part from public funds * * *"
>
> "Section 2. A Public School Fraternity, Sorority, or Secret Society as used in this Act is hereby defined to be any organization composed wholly or in part of public school pupils of public schools below the rank of College or Junior College as herein provided, which seeks to perpetuate itself by taking in additional members from the pupils enrolled in such school on the basis of the decision of its membership rather than upon the free choice of any pupil in the school who is qualified by the rules of the school to fill the special aims of the organization."[1]
>
> "Section 3. Any Public School Fraternity, Sorority, or Secret Society as defined in the preceding Section of this Act is hereby declared to be an organization inimical to the public good."
>
> * * *
>
> "Acts 1937, 45th Leg., p. 1139, ch. 460; Acts 1949, 51st Leg., p. 803, ch. 429."

[1]By stipulation in the first trial (1967) and by proof and findings of the Trial Court in the second trial (1970), the clubs of the Appellants came within the definition of an organization prohibited by the Code.

In 1969 the Legislature re-enacted the provisions of Article 301d above, and incorporated the same in Vernon's Education Code, Sections 4.20 and 4.21, Acts 1969, 61st Leg., p. 889.[1]

STATEMENT OF THE CASE

After wide publicity in all of the news media and after extended hearings, the Board of Education enacted a rule on November 9, 1966[2] prohibiting secret clubs in all of the junior and senior high schools (28) in the Fort Worth system in compliance with state law. The effective date of the rule was September, 1967. The delay from November 9, 1966, to September, 1967, was granted by the Board in order that the clubs would have time to disband in an orderly way. All of the clubs have disbanded. The rule was prospective in nature in that it required compliance ten months after the date of its enactment. The rule only required the students in the Fort Worth schools to comply with the law.

On March 31, 1967, the Plaintiffs filed suit against the school district in the United States District Court for the Northern District of Texas at Fort Worth, Texas.[3]

After briefs and argument, the Court entered an order of abstention "until the Courts of the State of

---

[1]This legislative enactment was subsequent to the decision of the Fort Worth Court of Civil Appeals in the case of Passel, et al. v. Fort Worth ISD, et al. and reported in 429 S.W. 2d 917 (1968).

[2]One of the attorneys of record in the Trial Court proceeding was present at the Board meeting and offered suggestions.

[3]Passel, et al. v. Fort Worth ISD, et al., No. CA-4-817.

Texas shall have been afforded the opportunity to determine the constitutional question here presented; * * *" The Texas Courts—Trial Court, Court of Civil Appeals, and the Supreme Court of Texas have since determined the law and the rule to be constitutional.

The Federal District Judge's Order of Abstention was in line with the decisions of this Court in *Railroad Commission v. Pullman*, 312 U.S. 496, 85 L.Ed. 971, and *Spector Motor Service v. McLaughlin*, 323 U.S. 101, 89 L.Ed. 101.

In the first hearing in the State District Court (1967), the Trial Judge sustained the Defendants' Motion to the Jurisdiction. This decision was affirmed by the Court of Civil Appeals reported in 429 S.W. 2d 917 (1968), and the Supreme Court of Texas reversed on the ground that the facts should have been fully developed [440 S.W. 2d 61 (1969)].

In April, 1970, there was a trial on the merits in an adversary proceeding before the Trial Court that lasted for two days.

The Superintendent of the schools [R. 13-114 and 450-56, Vol. 1], other administrative officials, teachers, parents, coaches (13 witnesses), testified at great length that the fraternities, sororities and secret clubs were "in" the schools and that their activities disrupted discipline and the orderly proceedings of the day to day operation. We briefly list only a few of such activities—

Disruption in general assemblies, pep rallies, and cafeteria; the mutilating of books, furniture and

walls of the buildings—[Twain Morrow, Vice Principal, Arlington Heights High School—R. 314-34, Vol. 1]

The requirement during initiation that boys kiss girls in the halls during school hours; encouragement of absenteeism by club members which caused a loss of state money by the district; disruption of teachers during class periods—[C. L. Turner, Vice Principal, Paschal High School—R. 348-67, Vol. 1]

Absenteeism in preparation for parties—[Mrs. Bill Ward, Assistant Principal and Dean of Girls, Eastern Hills High School—R. 368-72, Vol. 1]

Disturbances in class, effect on grades—[Mrs. J. K. Daniels, classroom teacher—R. 373-76, Vol. 1]

Congregating of club members in cafeteria; drinking of club members on football trips—[James E. York, classroom teacher—R. 379-84, Vol. 1]

The embarrassing and repulsive pencil and string incident—[Dayton G. Carter, classroom teacher—R. 385-99, Vol. 1]

Cutting classes; gathering on parking lots; truancy; pounding on tables yelling "loud Comanche type yells"; efforts of club members to prevent a Negro boy from being elected cheerleader at Paschal High School[1]—[J. D. Cooper, Vice Principal, Paschal High School—R. 400-15, Vol. 1]

Failure to receive a "bid" to one of the clubs resulting in forcing parents to take their daughters out of

[1]Within the last twelve years the Fort Worth ISD has been completely integrated without incident.

school and send them away to private schools—[Reverend James P. DeWolfe, Jr.—R. 117-37, Vol. 1]

Girls upset, crying, classes disturbed by activities of the clubs--[Mrs. Elizabeth Hull, classroom teacher —R. 127-37, Vol. 4]

Coaches Ludiker (Arlington Heights High School) R. 146-51, Vol. 4; Cox (Southwest High School) R. 155-64, Vol. 4; Allen (Paschal High School) R. 165-69, Vol. 4; all testified that the activities of the clubs were so disruptive that any boy who was a member of any such club could not participate in athletics.

The experienced trial judge made findings of fact and conclusions of law [Tr. 42-48].[1] Every finding was favorable to the Appellee and unfavorable to the Appellant. Among other things, the Court found:

1. Every student in the Fort Worth public school system, including members and non-members of charity clubs, "is afforded the same educational opportunities without discrimination."

2. "The activities of the 'charity clubs' have substantially and materially disrupted and affected the orderly operation of Arlington Heights High School, Eastern Hills High School and Paschal High School, all of which are high schools within the Fort Worth Independent School District."

3. "There was no evidence whatever that any of the exempted organizations had any effect whatever on the operation of the school system."

[1]The Trial Court's Opinion sets forth the findings of fact and conclusions of law. See Appendix "A" attached to this motion.

4. "The original twenty-three plaintiffs in this case have all graduated from high school."

5. "The members of the class for whom the original suit was brought have graduated from high school."

6. "Intervenors are all still attending high school and became parties to this suit prior to the time the original plaintiffs graduated from high school." (April, 1970)

The Trial Court entered judgment for the Schools. This judgment was affirmed by the Court of Civil Appeals as reported in *Passel, et al. v. Fort Worth ISD, et al.*, 453 S.W. 2d 888 (1970). The Texas Supreme Court denied a Writ.

THE CLUBS WERE IN THE SCHOOLS

The findings of the Trial Court foreclose the contention of the Appellants in the instant case that the activities of the clubs were not "in" the schools. The Appellants' entire case is based upon the contention that the activities of the club were outside of the schools. This contention was asserted eight times in the Appellants' Jurisdictional Statement. This contention was urged in the Trial Court, but it was not sustained by the evidence. On the contrary, the trier of the facts found that the activities of the clubs were in the schools and disrupted the discipline and orderly operations. In order for this Court to entertain probable jurisdiction: (1) It must disregard all of the testimony of the school authorities. (2) It must disregard the findings of fact of the Trial Court. (3) It must

disregard the facts as recited in the Opinion of the Court of Civil Appeals. (4) It must disregard the ruling of the Supreme Court of Texas.

Appellate Courts are bound by Trial Court findings and conclusions which are supported by evidence. *Willson v. Johnston*, 404 S.W. 2d 870 (1966).

In *Garner v. Louisiana*, 368 U.S. 157, 7 L.Ed. 2d 207, Mr. Chief Justice Warren, speaking for this Court said:

> "We of course are bound by a State's interpretation of its own statute and will not substitute our own judgment for that of the State's when it becomes necessary to analyze the evidence for the purpose of determining whether that evidence supports the findings of a state court." [p. 215]

THE QUESTIONS ARE MOOT

In the last hearing before the State District Court Judge, the testimony was uncontroverted and the Court so found that all of the original Plaintiffs and the class for whom the suit had been filed, had graduated from high school [Tr. 42-49]. Prior to the last decision of the Supreme Court of Texas, and while the case was pending before that court, the school district filed a Motion to Dismiss[1] and attached thereto an affidavit of the Superintendent of Schools under date of June 25, 1970, in which he swore under oath that every one of the Intervenors had graduated from high school prior to that date. There is no one before the Court with standing to prosecute this appeal. Since the clubs have disbanded, there is no class. It is no

[1]This motion was included in the record transmitted to the Clerk of this Court by the Clerk of the Court of Civil Appeals.

answer to argue that high school graduates have a "right" to return to school after they have graduated until they have reached the age of twenty-one. Thus, all questions are moot.

REASONS WHY THIS APPEAL SHOULD BE DISMISSED

1. The State has a substantial governmental interest in the public schools.

2. The Constitution enjoins the Legislature to "establish and make suitable provision for the support and maintenance of an efficient system of public free schools."

3. It must be presumed that the Legislature considered all factors when it enacted the statute prohibiting the secret clubs in the public schools. The findings of fact by the Trial Judge concerning the disruptive activities of the clubs in the schools confirms the wisdom of the legislative enactment. In *Cooper v. Aaron*, 358 U.S. 1, 3 L.Ed. 2d 5, this Court said:

> "It is, of course, quite true that the responsibility of public education is primarily the concern of the states."

In *Byrd v. Sexton*, 277 F.2d 418 (1960), certiorari denied 346 U.S. 818, the 8th Circuit said:

> "It is perhaps initially to be observed that the language quoted from Brown implies certain limitations. Neither that language nor the holding itself prescribes as a federal right the avail-

> ability of education, let alone free education, through state facilities. The opinion stands for the proposition that only 'where the state has undertaken to provide it,' the opportunity of an education 'is a right which must be made available to all on equal terms.' " [p. 425]

The Fort Worth Independent School District has strictly complied with the ruling in *Brown*[1] in that it has made available the right to an education to all on equal terms. Club members and non-club members have been afforded the same educational opportunities. The best proof is found in the fact that every member of the secret clubs and every member of the class for whom the suit was filed, including the intervenors, have all graduated from the Fort Worth high schools.

Mr. Chief Justice Warren, writing for this Court in the case of *U. S. v. O'Brien*, 391 U.S. 367, 20 L.Ed. 2d 672, said:

> " * * * we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. * * * " [p. 680]

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[1]Brown v. Board of Education of Topeka, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873, 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083.

UNIFORMITY

In declaring the public policy of the State, the Legislature declared that fraternities, sororities and secret clubs were inimical to the public good. The law is applicable to all of the schools in the entire state. Likewise, the rule of the Board of Education prohibiting the clubs in the Fort Worth schools was applicable to every student in the junior and senior high schools in the system. The Trial Court, the Court of Civil Appeals and the Supreme Court of Texas all found the law and the rule to be reasonable. The constitutional guarantees of freedom of speech, equal protection and civil rights apply to every student in the entire school system and not to a limited social group. Likewise, the constitutional rights are placed in proper perspective when viewed from the educational needs and opportunities of students as distinguished from the contentions of a limited few, who according to the Trial Court:

> "The activities of the charity clubs have substantially and materially disrupted and affected the orderly operation of Arlington Heights High School, Eastern Hills High School, and Paschal High School, all of which are high schools in the Fort Worth Independent School District."

In *Tinker v. Des Moines Community School District*, 393 U.S. 503, 21 L.Ed. 2d 731, Mr. Justice Fortas speaking for the majority, said:

> "A student's rights therefore do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express

his opinions, even on controversial subjects like the conflict in Vietnam, if he does so 'without materially and substantially interfering with appropriate discipline in the operation of the school' and without colliding with the rights of others. Burnside v. Byars, supra, at 749. But conduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guaranty of freedom of speech. Cf. Blackwell v. Issaquena City Bd. of Educ. 363 F. 2d 749 (CA5th Cir, 1966)."

CLASSIFICATION

The findings of the Trial Court that the exempted organizations (Boy Scouts, etc.) had not affected the orderly operation of the schools, forecloses the contention of Appellants concerning classification.[1] Further, classification of subjects is a legislative function and all doubts are to be resolved in favor of the reasonableness of the classification. [*San Antonio Retail Grocery v. Laferty*, 297 S.W. 2d 813; *State v. Southwestern Gas & Elec. Co.*, 193 S.W. 2d 675]

"The prohibition of the Equal Protection Clause goes no further than the invidious discrimination." To the same effect see *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483, 99 L.Ed. 563, *Ferguson v. Skrupa*, 372 U.S. 726, 10 L.Ed. 2d 93.[2]

---

[1]See Appendix "A"

[2]The authorities listed in Appendix "B" considered every question raised by the Appellants in the instant case. Two of the leading cases are Satan Fraternity v. Board, 22 So. Rep., 2d Series, p. 892, and Robinson v. Sacramento, 53 Cal. Rptr. 781.

PENAL PROVISIONS

The reference of Appellants to the penal provisions of the state law is wholly inapplicable in this case. The Texas Supreme Court in *Passel v. Fort Worth ISD*, 440 S.W. 2d 61-64, said:

> "Plaintiffs are not attempting to enjoin prosecutions under Article 301d. Apparently no prosecution is threatened or even contemplated. Injunctive relief is sought to prevent administrative enforcement of an administrative regulation adopted for the purpose of implementing the statute." [p. 64]

The school authorities have never contemplated nor suggested the possibility of invoking the penal provisions of the statute.

NO RACE PROBLEM INVOLVED

There is no race problem involved in this case. According to the findings of the Trial Court, the disruptive and adverse activities of the clubs were limited to three of the 28 high schools. Also, the Court found that the clubs were perpetuated by taking in additional members from the pupils enrolled in the school on the basis of the decision of the membership rather than on the free choice of any pupil in school who is qualified by the rules of the school to fill the special aims of the organization. This procedure was in violation of the Code. Before the clubs were disbanded, the membership was comprised wholly of white students, both the boys' clubs and the girls' clubs.

FEDERAL COURT DECISIONS

In the early case of *Waugh v. Board of Trustees*, 237 U.S. 589, 59 L.Ed. 1131, this Court decided that the State alone should determine whether fraternities should be allowed in the schools. Listen to the language employed:

> " 'It is said that the fraternity to which complainant belongs is a moral and of itself a disciplinary force. This need not be denied. But whether such membership makes against discipline was for the State of Mississippi to determine. It is to be remembered that the University was established by the State and is under the control of the State, and the enactment of the statute may have been induced by the opinion that *membership in the prohibited societies divided the attention of the students and distracted from that singleness of purpose which the State desired to exist in its public educational institutions.* It is not for us to entertain conjectures in opposition to the views of the State and annul its regulations upon disputable considerations of their wisdom or necessity.' " (Emphasis supplied.) [p. 747]

This Court also approved the language of the Supreme Court of Mississippi in the same case in which it was said:

> "Complainant is not deprived of any constitutional right, unless complainant can be said to have a constitutional right to breach the discipline of the school and set at naught the laws of the state."

All of the contentions urged in the present case were discussed and overruled in the case of *Webb v. State University of New York*, 125 Fed. Supp. 910, writ denied, in which the Court said:

> "We find little merit in the numerous contentions made by the plaintiffs as it is clear that the constitutionality of the action taken here cannot be questioned. A state may adopt such measure, including the outlawing of certain social organizations, as it deems necessary to its duty of supervision and control of its educational institutions."

To the same effect see *Hamilton v. Regents of The University of California*, 293 U.S. 245, 79 L.Ed. 343.

A more recent discussion of the right of the school authorities to control the conduct of students in the schools is found in the case of *Burnside v. Byars*, et al., 363 F.2d 744 (5th Cir. 1966)

> " * * * It is not for us to consider whether such rules are wise or expedient but merely whether they are a reasonable exercise of the power and discretion of the school authorities.
>
> "Regulations which are essential in maintaining order and discipline on school property are reasonable * * * Therefore, a reasonable regulation is one which measurably contributes to the maintenance of order and decorum within the educational system. * * * "

To the same effect see *Blackwell v. Issaquena County Board of Education*, 363 F.2d 749 (5th Cir., 1966).

STATUTES AND AUTHORITIES OF 25 STATES

Twenty-five states have enacted statutes that prohibit fraternities, sororities and secret clubs in the public schools. Some of these statutes are almost identical to the Texas statute. The list has been set forth in Appendix "B" attached to and made a part of this motion. Many of these statutes have been brought under attack alleging as in the present case, that they were in violation of the First and Fourteenth Amendments and civil rights. These contentions have been overruled and the statutes have been sustained. See authorities listed on Appendix "B".

UNREALISTIC CHARACTERIZATION

The appellants employed the term "right of association" in an effort to immunize the disruptive activities of the clubs in the schools. Appellants are content to rely upon authorities that are foreign to the regulation of the free public schools. The Appellants would paralyze the schools by encasing them in a semantic straight jacket by asserting rights that are not available to students who are not members of the select clubs. The Legislature, the Board of Education, the Trial Judge, the Court of Civil Appeals, and the Supreme Court of Texas feel that all students are entitled to equal treatment.

WHEREFORE, the Fort Worth Independent School District and the members of the Board of Education move the Court to dismiss the Appellants' Appeal on the ground that it does not present a substantial federal question and in the alternative to affirm the judgment of the State Courts.

Respectfully submitted,

Cecil A. Morgan
2108 Continental Life Building
Fort Worth, Texas 76102
(817) 335-3386

Counsel for Appellees

CERTIFICATE

I certify that I have served a copy of Appellees' Motion to Dismiss on Rufus S. Garrett, Jr., 919 Fort Worth National Bank Building, Fort Worth, Texas 76102, Counsel for Appellants, by depositing a copy of same in a mail box with first class Postage prepaid this ____ day of April, 1971.

Cecil A. Morgan

APPENDIX "A"

IN THE DISTRICT COURT OF
TARRANT COUNTY, TEXAS
17TH JUDICIAL DISTRICT

No. 48931-C

PASSEL, et al.
vs.
FORT WORTH ISD, et al.

OPINION

I have concluded that plaintiffs and intervenors have failed to prove that Article 301d of the Penal Code is unconstitutional or that the administrative enforcement of the regulation adopted by the school board for the purpose of implementing this statute violates any of their constitutional rights.

In Passel, et al vs. Fort Worth Independent School District, et al, 440 SW2 61 (Supreme Court), the court held that on the record then before it the statute was not unconstitutional as applied to plaintiffs and indicated that the trial court should hear evidence to determine the aims and activities of the organizations excepted in Section 4 of Article 301d.

The evidence was substantially the same at the hearing last week as it was at the injunction hearing in 1967 (There was just more of it), except that some evidence was offered about the aims and activities of some of the organizations named in Section 4. (There was no evidence about Boy Scouts, Hi-Y, Girl Reserves

or Pan-American Clubs.) Evidence was also offered in an attempt to show that at least some of the "charity clubs" proposed to select members by a board of sponsors composed in part of mothers of active members.

Plaintiffs and intervenors failed to prove that there was not a reasonable basis for the classification established by the legislature or that the exempting of certain organizations from the statute was palpably arbitrary. There was no evidence whatever that any of the exempted organizations had any effect whatever on the operation of the school system. The amending of the constitutions and by-laws of some of the clubs fails to meet the requirements of Section 2 of the statute that any student who is qualified by the rules of the school to fill the special aims of the organization may join if he chooses to do so.

I make the following findings of fact and conclusions of law which I suggest be included in the judgment in this case:

FINDINGS OF FACT

1. This is a class suit on behalf of all minors who are members of a charity club and their parents.

2. The original twenty-three plaintiffs in this case have all graduated from high school.

3. The members of the class for whom the original suit was brought have graduated from high school.

4. Intervenors are all still attending high school and became parties to this suit prior to the time the original plaintiffs graduated from high school.

5. On November 9, 1966, the Board of Education of the Fort Worth Independent School District promulgated a rule prohibiting fraternities, sororities, secret societies (including charity clubs) from carrying on their activities in grades 7 through 12 in the Fort Worth Public Schools.

6. To implement the rule enacted by the Board, a supplementary application was required by the parent or guardian of each student enrolled in grades 7 through 12. This form required that the parent or guardian certify that his son or daughter was not a member or pledge of any organization described in Article 301d, and that the child would not join or participate in the activities of such a club or organization.

7. The original plaintiffs were members of a club prohibited by Article 301d. The intervenors are members of a club prohibited by Article 301d. The amended constitutions and by-laws of several of the clubs, including the Musagetes, provide that active members of such clubs shall be selected by a board of sponsors consisting, in part, of mothers of active members. Such amended constitutions and by-laws also provide that they may be amended by a vote of the active members. Such constitutions and by-laws do not provide that a pupil in any school who is qualified by rules of the school to fill the special aims of the organization may become a member of such organization upon his free choice. The Musagetes have not selected any members under the new constitution and by-laws and neither it nor any other "charity club" has operated

under amended constitution and by-laws. None of the "charity clubs," including the Musagetes, has ever selected its members on the basis of the free choice of any pupil in a school who was qualified by school rules to fill the special aims of the organization.

8. None of plaintiffs or intervenors has been denied enrollment in the Fort Worth Public Schools.

9. Every student in the Fort Worth Public School system, including members and non-members of "charity clubs," is afforded the same educational opportunities without discrimination.

10. The activities of the "charity clubs" have substantially and materially disrupted and affected the orderly operation of Arlington Heights High School, Eastern Hills High School and Paschal High School, all of which are high schools within the Fort Worth Independent School District.

11. Prior to the time that the "charity clubs" ceased to be active they engaged in activities similar in character to university fraternities, sororities and secret societies in the following manner: Interclub council, rush, pledge, parties, meetings, pins, similar dress.

12. None of the organizations (Boy Scouts, Hi-Y, et cetera) exempted by the statute has in the past affected the orderly operation of the schools in the Fort Worth Independent School District, and none of such organizations has participated in school activities.

13. Arlington Heights High School and Paschal High School each has societies and clubs sponsored by school authorities. Any student in each of the

schools is eligible for membership in any one or all of such societies and clubs if he meets the special aims of the organization such as scholarship, member of a football team and the like.

CONCLUSIONS OF LAW

1. The legislature alone determines the public policy for the state, and this court presumes that the legislature considered all of the facts which are in evidence when it enacted Article 301d of the Penal Code.

2. Courts favor constitutionality of statutes and must presume that the legislative body has acted within its powers in enacting Article 301d.

3. One who attacks the constitutionality of a statute must show that the statute is palpably arbitrary, and without reasonable basis.

4. Plaintiffs and intervenors have failed to show by a preponderance of the evidence that the legislature had no reasonable basis for the classification established in Section 4, Article 301d, Penal Code, or that the enactment of the statute was palpably arbitrary.

5. The classification set forth in Section 4 does not constitute an unlawful discrimination against plaintiffs and intervenors, nor does the act or any section thereof deprive plaintiffs and intervenors of any personal or civil right guaranteed to them by the state or federal constitutions.

Judgment is rendered for defendants.

Chas. J. Murray
Judge Presiding.

APPENDIX "B"

STATUTES AND AUTHORITIES OF 25 STATES

Statutes

Arkansas — Ark. Stat. 1947, §§80-2001-2007
Colorado — Colo. Rev. Stat. 1963 123-21-18, 19
Florida — Fla. Stat. Ann., Title XV, §§232.39-232.42 (Vol. II)
Idaho — Code §§33-1901 through 33-1903
Illinois — Rev. Stat. 1959, Ch. 122 §§31-1-31-5
Indiana — Burn's Stat. §§28-5106
Iowa — Code Ann. §287.1-4
Kansas — Kan. Stat. §72-5311
Louisiana — LSA Rev. Stat. §§17:2091-2093
Maine — Rev. Stat., Title 20, §803
Massachusetts — Annotated Laws, Ch. 71, §47 (Vol. 2B)
Michigan — Stat. Annotated, Title 15, §§15.3921-15.3924 (Vol. II)
Minnesota — Minn. Stat. Ann., §127.17
Mississippi — Miss. Code 1942, §6486-01
Montana — Rev. Code 1947 §75-2802; §§75-4223 through 4227
Nebraska — Rev. Stat. 1943 §§79-4, 125-79-4, 127
New Jersey — NJSA §§18A:42-5, 18A:42-6
Oklahoma — Stat. Ann. 70 §20-2
Ohio — Page's Revised Code Ann. Title 29, §2923.35
Oregon — Ore. Rev. Stat. §336.610
Pennsylvania — Purdon's Stat. Ann., Title 24, §5-511

Rhode Island — Laws of R. I. 1956 §16-38-4
Texas — 301d Penal Code
Vermont —Vt. Stat. Ann. Title 16 §1164
Washington — 43.63.140(5)

Authorities

Coggins, et al. v. Board of Education of Durham, 28 S.E. 2d 527 (North Carolina)

Holroyd, et al. v. Eibling, et al., 188 N.E. 2d 208 (Ohio)

Antell v. Stokes, 191 N.E. 407 (Massachusetts)

Satan Fraternity, et al. v. Board of Public Instruction for Dadc County, et al., 22 So. Rep., 2d Series, p. 892 (Florida)

Judy Robinson, et al. v. Sacramento City Unified School District, et al., 53 Cal. Rptr. 781 (California)

Steele v. Sexton, 234 N.W. 436 (Michigan)

Lee v. Huffman, 166 N.W. 565 (Iowa)

Burkitt v. School Dist., 246 Pac. 2d 566 (Oregon)

Hughes v. Caddo Parish, 57 F. Supp. 508, affirmed 89 L.Ed. 554 (Louisiana)

Wayland v. Hughes, 86 Pac. 642 (Washington)

Wilson v. Board of Education, 84 N.E. 697 (Delaware)

Wilson v. Abilene ISD, 190 S.W. 2d 406, ref. W. M. (Texas)

Supreme Court, U.S.
FILED
JUN 11 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

October Term 1970

NO. 1538

JANIE PASSEL, ET AL.,

Appellants,

vs.

FORT WORTH INDEPENDENT SCHOOL DISTRICT, ET AL

Appellees.

On Appeal From the Court of Civil Appeals
For the Second Supreme Judicial District of Texas
at Fort Worth

Appellants' Petition for Rehearing

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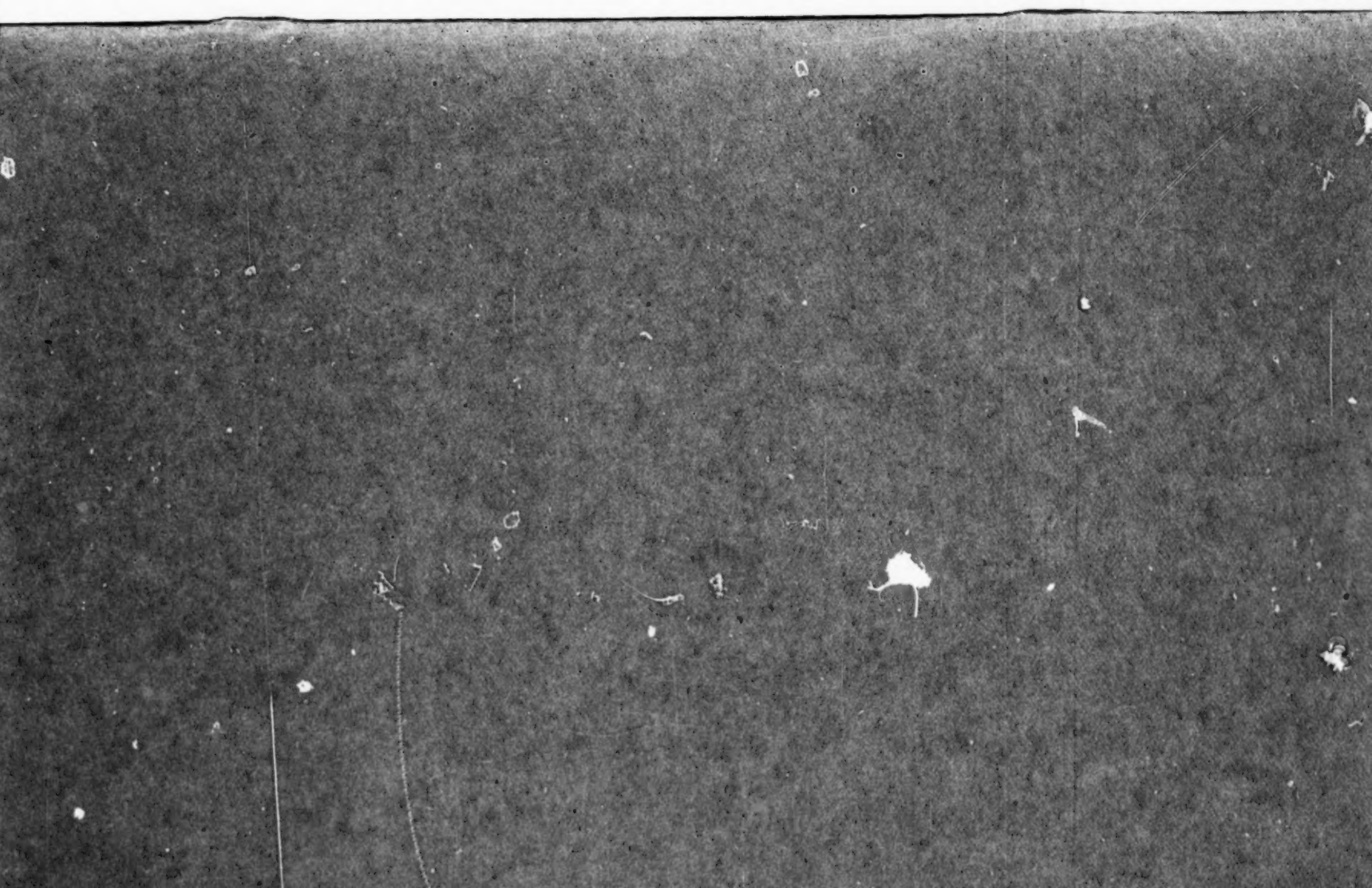

IN THE

Supreme Court of the United States

OCTOBER TERM 1970

NO. 1538

JANIE PASSEL, ET AL.,

Appellants,

VS.

FORT WORTH INDEPENDENT SCHOOL DISTRICT ET AL.,

Appellees

APPELLANTS' PETITION FOR REHEARING

Pursuant to Rule 58, this Honorable Court is earnestly requested to grant rehearing upon its Judgment dismissing this Appeal for want of jurisdiction.

The opinion appealed from cannot be permitted to stand. Aside from Appellants' rights in the matter, and until corrected, the opinion of the Court of Civil Appeals will cause citizens of this and other states to be deprived of First Amendments rights because of the failure of this Court to find a substantial Federal question here.

The Texas Penal Statute in question (Article 301d, Appendix A), as construed by the Court of Civil Appeals, declares that any organization having a selective membership is a "Secret Society . . . inimical to the public good", and this Court has confirmed that persons enrolled in the public schools of Texas are constitutionally prohibited from membership in any such organization even during summer vacation. In short, *there is no right of "privacy in group association" for these people.* This, despite the fact that the organization is not affiliated in any

way with the public schools, has legitimate aims, and conducts all of its activities after school hours and off of school property. In this situation, what is the overriding consideration which permits the State, in the name of education or under any other pretense, to require that its citizens forego personal rights which this Court has found to be protected by the First and Fourteenth Amendments?

This Court has unequivocally announced its determination to protect privacy in group association. Has it now decided to be selective in its protection? Are sudents in public schools less entitled to First Amendment Rights than other citizens?

In Texas a "high school dropout" enjoys freedom to choose his associates, a student in the schools does not.

This refusal of this Honorable Court to find probable jurisdiction compels any person familiar with the background of this case to wonder, in dismay, what has happened to the following guidelines of First Amendment rights:

". . . *even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.*" *Shelton v. Tucker,* 364 U.S. 479, 488, 5 L.ed. 2d 231, 81 S.Ct. 247. (Emphasis added)

In the instant case no evidence whatever indicated that the "disruption" of which Appellants complain could not be avoided through less restrictive means. The evidence showed clearly that disciplinary measures had been sufficient to eliminate "disruption" where any occurred.

There was no proof of any necessity to regulate the clubs or to regulate their members except as to "on campus" behavior.

An individual is entitled to be judged by his own conduct and not that of his associates. Speiser v. Randall, 1958, 357 U.S. 513, 78 S.Ct. 1332, 2 L.ed.2d 1460, *Elfbrandt v. Russell,* 384 U.S. 11, 17, 16 L.ed.2d 321, 325, 86 S.Ct. 1238.

Isolated incidents of misconduct of individuals, usually unidentified, is the only basis for the holding that the clubs had a disruptive effect.

Proof of misconduct by some members of some organiza-

tions is an insufficient basis for the prohibition of the existence of all like organizations. Amalgamated Food Employees Union, Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 20 L.ed.2d 603, 88 S. Ct. 1601.

> *"First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."*

Tinker v. Des Moines Community School Dist., 393 U.S. 503 21 L.ed.2d 731, 89 S.Ct. 733. (Emphasis added)

The refusal to take jurisdiction in this case has slammed the schoolhouse doors in the face of First Amendment rights.

Unless granted relief by this Court, school age citizens become third class citizens, with fewer rights available to them than to those who complain of being "second class citizens".

Probable jurisdiction in this case should be noted to avoid a precedent which denies the existence of right of free association. We urge that this Court has an obligation to consider this case on its merits.

Respectfully submitted,

RUFUS S. GARRETT, JR.
919 Fort Worth National Bank Bldg.
Fort Worth, Texas 76102
Attorney for Appellants

CERTIFICATE

I certify that this petition for rehearing is presented in good faith and not for delay.

I further certify that I have served a copy of Appellants' Petition for Rehearing on Cecil Morgan, Esq., Morgan, Gamble & Owen, Continental Life Building, Fort Worth, Texas 76102, counsel for Appellees, by depositing a copy of same in a mail box with first class Postage prepaid this_____day of June, 1971.

_____

Rufus S. Garrett, Jr.